166-493

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JAMES H. McK

THE

SUPREME COURT

OF THE

UNITED STATES.

EDWIN D. CARTER,
Plaintiff in Error,

vs.

CHARLES RUDDY, *et al*,
Defendants in Error.

166-493

576

BRIEF OF ~~DEFENDANTS~~ Plaintiff IN ERROR,

On Defendants' Motion to Dismiss.

JOHN R. McBRIDE,
Counsel for Plaintiff in Error.

1896:
THE SHAW-BORDEN COMPANY,
SPOKANE, WASH.

THE

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BRIEF OF DEFENDANTS IN ERROR,

On Defendants' Motion to Dismiss.

This action is brought by the plaintiff in error in the Territorial Court of Idaho to recover the possession of part of a block of land in the Town of Wallace, Shoshone County, Idaho.

When Idaho was admitted as a State, the plaintiff availing himself of the provisions of Section 18 of the Enabling Act admitting the Territory as a State, filed his written request, in the form of a petition, to have the cause transferred to the Circuit of the United States for the District of Idaho which had also been created by the Act.

In his petition for removal or transfer of the Cause, the plaintiff alleged two grounds, viz:

1st. That at the time of the Commencement of the action, the plaintiff was citizen and a resident of the State of Wisconsin and that Defendants were citizens of the then Territory, now State of Idaho.

2nd. That the Plaintiff claimed title to the premises by virtue of prior possession and improvements under the Townsite Laws of the United States and also under a deed from one Walter Bourke, a Sioux half-breed, who had entered the land with Sioux half-breed script issued under an Act of Congress, and showing the contention of the Defendants with reference to those laws of Congress and that there was a disputed question of construction of those laws. In short, as we believe, that a Federal question was involved in the case.

At the first term of the United States Circuit Court, the Defendants moved to remand the case to the State Court and upon this motion the Court held that a Federal question was involved in the cause

and it was properly transferred to the Federal Court on that ground—but that the facts stated in the petition as to diverse citizenship showed no ground for removal, because the Defendants were citizens of a *Territory*, and not a State at the time of the action.

See the opinion of the late Mr. Justice Sawyer in Johnson *et al.*, vs. Bunker Hill, 46 Fed., 417.

The writ of error from the Supreme Court to the Circuit Court of Appeals was applied for as of right, on the ground that the jurisdiction of the Circuit Court was "not dependent entirely upon the opposite parties being citizens of different states," but on the contrary that the jurisdiction was dependent upon the fact of a federal question being involved, as was held by the Circuit Court, and that therefore the decision of the Circuit Court of Appeals was not final, and that the case came within the provisions of the latter part of Sec. 6 of the Act creating the Circuit Court of Appeals, which is as follows:

"In all cases not hereinbefore, in this section, "made final, there shall be of right an appeal or writ "of error or review of the case by the Supreme "Court of the United States, where the matter in "controversy shall exceed one thousand dollars be-"sides costs."

26 Stat. at Large, 826.

Judging from the brief of the counsel for the respondent in his motion to dismiss this writ, he treats this case as though the same had been removed into the Federal Court under the general act of Congress for the removal of cases, (Acts of March 3rd, 1887, Chap. 373, and August 13th, 1888, Chap. 866), and that the facts showing that a federal question was involved, not appearing in the complaint, the Circuit Court had no jurisdiction upon that ground, and that the jurisdiction depended entirely upon the ground of diverse citizenship of the parties, and therefore the decision of the Circuit Court of Appeals became final.

In this contention we think the counsel is in error.

Was it necessary under the enabling act for the admission of Idaho that facts showing a federal question should so appear affirmatively in the complaint?

We think it must be presumed that Congress in passing an Act for the admission of a new State, must have had some knowledge of the condition of the Territory about to be admitted. It must have know that there were causes pending in both the District and Supreme Courts. It must have known that, under the laws of practice in the Territory, no allegation of diverse citizenship, or allegation to show that a disputed question of some statute or law of the United States, was involved or was necessary, in order to maintain a suit in the Territorial Court;

such allegations would have been superfluous and redundant, and could have been stricken out as such.

Again, unless some provision should be made in the Enabling Act, directing to what court the causes should be transferred, the causes would abate.

These causes up to the time of the Enabling Act, were in a semi United States Court. If it saw fit, Congress could have repealed all the laws of the Territory of Idaho, relating to the practice as well as other matters, and could have provided that all these cases pending in the Territorial Courts should be transferred to the courts of the State of New York for trial, or created on entirely new court and transferred the causes to it.

"Congress shall have power to dispose of and "make all needful rules and regulations respecting "the Territory or other property belonging to the "United States."

Constitution of United States, Art. 4, Sec. 3.
Ins. Co. v. Canter, 1 Peters, 545.
U. S. v. Grotiot, 14 Peters, 532.
Freeborn v. Smith, 2 Wall., 176.

By examination of the Enabling Act for the admission of Idaho, Section 18, Act July 3rd, 1890, Chap. 556, we find that in respect to "*all cases*, *proceedings and* "*matters* now pending in the Supreme or District

"Courts of said Territory at the time of the admis-
"sion into the Union of the State of Idaho, and aris-
"ing within the limits of said State, whereof the
"Circuit or District Courts by this Act established
"*might have had jurisdiction* under the laws of the
"United States had such courts existed at the time
"of the commencement of such cases, the said Cir-
"cuit and District Courts, respectively, *shall be the*
"*successsors of said Supreme and District Courts of*
"*said Territory* * * * * * *
"Provided however that in all civil actions, causes
"and proceedings in which the United States is not
"a party, transfers shall not be made to the Circuit
"and District Courts of the United States, except
"upon *written request* of one of the parties to such
"action or proceeding filed in the proper court, and
"in the absence of such request such cases shall be
"proceeded within the proper State Courts."

This Statute is the authority and the *only* author-
ity for the transfer of the causes. They are not re-
moved under the removal acts, as the counsel for
the defendant by his argument would seem to insist.
The Federal Courts are the *successors* to the Territo-
rial Courts, and only two conditions are necessary for
such succession, viz: It must be a case which *might*
have been brought in the Circuit Court under the laws
of the United States if the court had existed, etc., and
one of the parties must *request* its transfer to the Cir-
cuit Court.

This was a case in fact which might have been brought in the Circuit Court, and request was made.

The Act for the Admission of Idaho does not say that the case to be transferred *must appear, by the pleadings or the complaint*, or in any other way, to be one which might have been brought in the Circuit Court. Nor does it say that the request in writing must show such fact. If the cause was one *which in fact might have been brought* in the Federal Court, then it must be transferred upon the written request of either party. Congress need not have provided for the transfer of the cases to any court, and they would have abated. It might have created a new and independent court to have determined them all, or it might have sent them all to the new State Courts, or sent them all to the new Federal Courts. Such being the case, it is but following the plain language of the Statute to hold that where the action arises under the laws of the United States *in fact, i. e.*, where the rights of the parties depend upon the proper construction of some law of Congress, as in this case, it should be transferred upon request. To hold otherwise, would be to interpolate words into the Statute requiring these questions to be shown by the pleadings or the request, and when we start in to interpolate new provisions, where shall we stop?

To say that the facts must have appeared in the complaint, would be to send all the cases to the State

courts, because, as we before said, the forms of pleading in the Territorial courts did not require or tolerate such allegations.

How can it be said that when Congress said the cause should be transferred upon the *request* of a party, it meant that such request should be in the form of a complaint containing allegations of jurisdictional facts. What warrant have we that Congress intended anything of the kind ?

Congress was providing for the disposition of cases that stood in an anomalous condition ; they had of necessity been brought in the Territorial courts, the parties having no other choice ; they were there without adequate pleadings of jurisdictional facts such as would have been necessary had the suits been brought in the Federal courts. Under the Removal Act of March 3, 1887, a citizen New York having a claim against a citizen of California, might exercise his choice to bring suit in the State courts of California or New York, or in the United States Circuit Court of New York or California. If he brought the suit in the State court of California, the place of residence of the defendant, then the defendant could not remove the cause to the Federal Court, and yet it was a cause which the plaintiff could have brought in the Federal court of California.

This is plain from the reading of the following portion of Section 2 of the Act of March 3rd, 1887:

"Any other suits of a civil nature at law or in "equity of which the Circuit courts of the United "States are given jurisdiction by the preceding sec- "tion, and which are now pending, or which may "hereafter be brought in any State court, may be "removed into the Circuit Court of the United "States, for the proper District, by the defendant or "defendants therein, *being non-residents of that State.*"

But by the terms, of Section 18 of the Act for the Admission of Idaho, any suit which might have been brought in the United States Circuit Court had such court existed at the time the suit was commenced, could be transferred at the request of either party, and thus a defendant resident of Idaho sued in the Territorial court could remove the suit, whereas if Idaho had been a State and the defendant a resident thereof at the time the suit was brought he could not have removed the cause. The plaintiff, could also, under the Idaho Admission Act, remove the cause, yet under the general Removal Acts, if a plaintiff elected to bring a suit in the State court, he had to stay there unless defendant removed the case; and again, under the provisions of the Idaho Enabling Act, no bond is required of the party requesting the removal.

Again, in the General Removal Act, Sec. 3, Act of March 3rd, 1887, it is provided that the party desiring to remove the cause may make and file in the State court a "*petition.*" Now a petition in practice has always been a form of pleading. In many states it takes the place of the complaint or declaration. Yet, Congress knowing that the courts had put a construction on the word petition, as used in the removal acts, and had held that the petition must set forth the grounds on which the removal was asked, did not in the Act for the Admission of Idaho require a *petition* for removal to be filed, but simply a *request* that the case be transferred.

The argument of the defendant in error on this question is based upon the general removal acts which have nothing whatever to do with the question involved herein, viz: the transfer of cases pending in the Territorial courts at the time of the admission of Idaho as a State, which transfer depended not upon any general or existing prior law, but upon the special law (Idaho Enabling Act) which Congress saw fit to enact for that purpose, and which it (Congress) had the absolute and exclusive power to enact.

In the language of Mr. Justice Grier, in speaking for the Supreme Court of the United States:

"The extinction of the Territorial government "and succession of the Territory into a State, under

"our peculiar institutions, necessarily produce some "anomalous results, and questions which cannot be "solved by precedents from without."

"It cannot be disputed Congress has the exclu- "sive power of legislation in and over the Territo- "ries."

Freeborn v. Smith, 2 Wall., 173.

The Territorial Courts are courts of the United States, and the control of their records therefore belongs to the Federal Government, and it rests with Congress to declare to what tribunal these records and proceedings shall be transferred, and how the judgment of the Territorial Courts shall be carried into execution or reviewed upon an appeal or writ of error.

Hunt v. Palleo et al., 4 How., 590.
Benner v. Porter, 9 How., 246.

But even if it be held that the jurisdictional facts, i. e. facts showing a Federal question should be pleaded by the plaintiff, has he not done so? His petition for removal is in the nature of a complaint duly verified, and when taken in connection with the complaint would be complete.

After the Enabling Act was passed he could not well go into the State Court and ask to amend his complaint without waiving his right of removal or

transfer of the cause. The act is silent as to how these questions of jurisdiction shall be made to appear. It does appear by the petition and this is in accordance with the practice as it existed under the act of 1875, and before the decisions of this court holding that the Federal question must appear from the complaint.

Mitchell v. Smale, 140 U. S., 406.

Counsel for defendant in error also contends that the writ of error herein was sued out for the purpose of delay, as the record discloses the fact that plaintiff in error did not have the legal title to the land and for that reason could not maintain his action in the courts of the United States.

We submit such is not the law. Congress has authorized the building of towns and cities upon the public lands, both surveyed and unsurveyed, and provided a means of obtaining title thereto. It is often years after the settlement and building of towns, and even cities, before the strict *legal title* can be acquired from the Government, and during this time, especially in the west, large and permanent blocks of building are often erected on the land. This right of occupancy with the right to acquire the legal title from the Government is property in the highest sense of the term. It may be conveyed and mortgaged like other real property. It

may be sold on execution to satisfy debts and also inherited by a man's heirs.

We insist that such a right is a legal title sanctioned by the laws of the United States and good as against every one except the government, and especially as against naked trespassers. Can it be said that a trespasser upon such a right can with impunity take possession of other people's property thus situated, for instance a brick block, and hold it, and that courts of the United States are powerless to give relief? We submit that such is not and never has been the law. The defendants being mere intruders were in no position to challenge the plaintiff's title.

Christy v. Scott, 14 How. U. S., 282-295.
Hale v. Games, 22 How., 144 and 160.

But the motion to dismiss assumes that we have not the legal title. It is true the Court of Appeals so held, and it is this error which we wish to review. If the Sioux Scrip location was good, as we contended below, and as we insist now, then we had a perfect legal title and the decision should be reviewed in order to determine that question. It is a question involving the merits and is not subject to the motion to dismiss.

The record will show that the defendants in the night time, aided by a hundred or more persons bent

on like intent as to other lands in the vicinity, took possession of the lands in controversy which the plaintiff had in good faith purchased and took possession under a warranty deed, and improved the same at the cost of several thousand dollars. The defendants have been in possession ever since enjoying the property. This writ of error was sued out within the time allowed by law in good faith. No opportunity has yet been offered to review the case on the merits. Under these circumstances it cannot be said the writ was sued out for delay.

We submit that the motion to dismiss the writ of error should be overruled and the cause heard on the merits.

JOHN R. McBRIDE,
Counsel for Plaintiff in Error.

166-301

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 252

ALONZO W. ALLEN, PLAINTIFF IN ERROR,

vs.

ANDREW J. CULP.

IN ERROR TO THE COURT OF COMMON PLEAS, NO. 4, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

FILED APRIL 4, 1895.

(15,855.)

(15,855.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 581.

ALONZO W. ALLEN, PLAINTIFF IN ERROR,

vs.

ANDREW J. CULP.

IN ERROR TO THE COURT OF COMMON PLEAS, NO. 4, FOR THE COUNTY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1895.

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1 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the court of common pleas, No. 4, for the county of Philadelphia, State of Pennsylvania, Greeting:

Seal of the Supreme Court of the United States.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of common pleas, upon a remittitur from the supreme court of the State of Pennsylvania, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Andrew J. Culp, plaintiff, and Alonzo W. Allen, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a

2 treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] Supreme Court U. S. (C. P. 4, Philada. Co., June T., 1893. No. 220. Culp *vs.* Allen.) Writ of error. Feb'y 14, 1895, bro't into office. C. B. R., deputy. Feuton.
1—581

4 UNITED STATES OF AMERICA, *ss:*

To Andrew J. Culp, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of common pleas, No. 4, for the county of Philadelphia, State of Pennsylvania, wherein Alonzo W. Allen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

5 [Endorsed:] Supreme Court U. S. C. P. 4, Philada. Co., June T., 1893. 220. Culp *vs.* Allen. Citation. Filed Feb. 15, 1895. P. H. White, *pro* proth'y. Fenton.

I hereby accept service of within citation and acknowledge receipt of a copy thereof and of a copy of the writ of error this 14th day of February, 1895.

A. J. CULP.

6 *Exemplification.*

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceedings of the court of common pleas, No. 4, for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 220, June term, 1893, to wit:

Docket Entries, June Term, 1893.

Oct. 26, '93 C. Dillingham. G. B. Carr. 220 H. T. Fenton.	Andrew J. Culp *vs.* Alonzo W. Allen.	Sum's' assumpsit, exit May 26, 1893; ret. 1 Mon. June, 1893.
	May 16, '93, statement of claim filed.	Served writ and statement May 27, 1893.
May 5, '94, pl'ff's bill of $29.50 filed.	June 3, '93, aff't of defence filed.	Sept. 23, '93, rule to withdraw statement.
S. C. costs, $11.	June 8, '93, rule to plead filed.	June 24, '93, rule absolute.
	June 9, '93, pleas filed.	Sept. 23, '93, rule for the production at the trial of the cause books, papers, &c., mentioned in aff't.
	June 27, '93, statement filed.	*Eo die*, aff't filed.
	Oct. 18, '93, answer of def't for rule on him to produce books, &c., filed.	Nov. 11, '93, rule absolute.
	June 12, '94, jury fee paid (by def't).	*Eo die*, depositions filed.
	Eo die, judgment.	Dec. 7, '93, rule for attachment.
7	June 12, '94, certiorari from S. C. (of July, 1894, No. 138) bro't into office.	Dec. 9, '93, rule absolute.
	June 29, '94, record certified to S. C.	Dec. 16, '93, rule for attachment withdrawn.
	Feb'y 4, '95, record returned & remittitur from S. C. filed, certifying judgment affirmed.	M'ch 6, '94, exceptions sustained and ordered that the def't answer more fully the interrogatories of the bill.
	Feb. 14, '95, supersedeas bond (for writ of error to Sup. Court U. S.) filed.	May 4, 1894, jury called.
	Feb. 14, 1895, writ of error from S. C. of U. S. bro't into office.	May 4, 1894, verdict for pl'ff, $225.
	Feb. 15, '95, citation filed.	May 5, '94, motion for a rule for a new trial.
	Eo die, citation of error filed.	*Eo die*, reasons filed.
	Feb. 15, '95, assignments of error filed.	May 16, 1894, stenographic notes filed.
	Nov. 8, '93, interrogatories filed.	June 5, '94, rule refused.
	Dec. 30, '93, answers filed.	June 12, '94, bill of exceptions filed.
	Jan. 10, '94, exceptions to answer filed.	Bill in equity filed Nov. 8, 1893.
	M'ch 5, '95, amended bill filed.	M'ch 5, '94, leave granted to file amended bill and interrogatories.
	Eo die, amended interrogatories filed.	M'ch 21, 1894, rule on def't to produce certain books for pl'ff's inspection.
	M'ch 14, '94, amended answer filed.	M'ch 24, 1894, rule absolute.

Certified from the record this 20th day of March, A. D. 1895.
C. G. McCULLOUGH, *Pro Prothy.*

8 *Summons.*

COUNTY OF PHILADELPHIA, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

We command you that you summon Alonzo W. Allen, late of your county, so that he be and appear before our judges, at Phila-

delphia, at our court of common pleas, No. 4, of the county of Philadelphia, to be holden at Philadelphia, in and for said county, on the first Monday of June next, there to answer Andrew J. Culp of a plea of assumpsit; and to have you then and there this writ.

Witness the Honorable M. Russell Thayer, president judge of our said court, at Philadelphia, the 26th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

J. S. HUNTER,
Pro Prothonotary.

9 [Endorsed:] 220. June term, 1893. Court of common pleas No. 4. Andrew J. Culp *vs.* Alonzo W. Allen. Summons. Assumpsit. Geo. B. Carr.

Served Alonzo W. Allen, residing at 2041 Park Av., by leaving, May 27, 1893, a true and attested copy of the within writ at his dwelling-house with an adult member of his family.

So answers—

HENRY BOYER, *Deputy Sheriff.*
HORATIO P. CONNELL, *Sheriff.*

10 And afterwards, to wit, on May 16, 1893, the said plaintiff, Andrew J. Culp, by Geo. B. Carr, Esq., his attorney, declares against the said Alonzo W. Allen, in the plea aforesaid, in the following words and figures, to wit:

11 *Plaintiff's Statement of Claim.*

In Court of Common Pleas, No. 4, for the County of Philadelphia, June Term, 1893.

ANDREW J. CULP
vs.
ALONZO W. ALLEN. } No. 220.

CITY OF PHILADELPHIA, *ss:*

The plaintiff, Andrew J. Culp, claims of the defendant, Alonzo W. Allen, the sum of twenty-five thousand dollars, with interest, which is justly due and payable to the plaintiff by the defendant upon the cause of action whereof the following is a statement:

On January 19th, 1886, letters patent for a cop and bobbin winding machine, numbered 334,569, were granted to Andrew J. Culp, the plaintiff, and Alonzo W. Allen, the defendant, a copy of which patent is hereto annexed and marked Exhibit A. The defendant has been continuously manufacturing and selling the said patented machine since November, 1886, while the plaintiff has made no use of it during this period.

On August 4th, 1892, at Atlantic City, New Jersey, the defendant induced the plaintiff to assign to him the undivided half interest, which the plaintiff owned in the said patent, under the following circumstances: On the said date the defendant represented that he

was about to expend a large sum of money in making certain alterations and improvements in the said patent, and had also made arrangements to proceed against infringers thereof; that for the sake of convenience in carrying on these matters, he wished to have the whole patent in his own name. On the strength of these representations the following contract was entered into: In consider-
12 ation of the plaintiff's assigning his undivided half interest in the said patent to the defendant, the defendant promised to pay the plaintiff one-half of all that he, the defendant, had made out of said patent in the past, and also one-half of all that he should make out of it in the future, whether profits of manufacture or damages from infringers. The plaintiff in accordance with this contract, then and there executed a formal assignment of the said patent, reciting the nominal consideration of one dollar, a copy of which is hereto annexed and marked Exhibit B. This assignment was duly recorded at Washington on August 11th, 1892, in M. 46, page 100, of transfers of patents.

Though the plaintiff has thus only performed his part under the contract, the defendant has neglected and failed to account to the plaintiff for one-half the profits made from this patent before and since the assignment, which is due under the contract.

That the defendant, for the purpose of proceeding more conveniently and expeditiously against certain infringers and for the purpose of obtaining damages from them under the *qui tam* act of February 4th, 1887, did apply for and obtain on December 6th, 1892, a design patent No. 22055, covering the bracket arm of the tension device, which was the particular portion of the patent infringed upon. The Patent Office granted this design patent, a copy of which is hereto annexed, and marked Exhibit C, only after finding that the defendant now held the whole of the title to the original mechanical patent.

That the defendant has now given the plaintiff notice that the arrangements for the proceeding against infringers have been cancelled, and that he, the defendant, has no intention of proceeding further in the matter. Wherefore the plaintiff claims from the defendant the sum of twenty-five thousand dollars ($25,000.00), being the one-half of all profits made by the defendant from the said patent.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

Andrew J. Culp, plaintiff in the foregoing suit, being duly
13 sworn according to law, deposes and says that the facts set forth in the foregoing statement as a basis of claim are true.

ANDREW J. CULP.

Sworn to and subscribed before me this 22d day of June, A. D. 1893.

LEVI C. ALBERTSON,

[SEAL.] *Commissioner of Deeds for the State of Pennsylvania.*

Exhibit B.

Whereas I, Andrew J. Culp, of Philadelphia, Pennsylvania, in conjunction with Alonzo W. Allen, of Philadelphia, Pennsylvania, did obtain letters patent of the United States, number 334,569, of January 19th, 1886, for an improvement in winding machines; and whereas, I am now the owner of an undivided one-half interest of and in said patent; and whereas, the said Alonzo W. Allen, of the city and county of Philadelphia, State of Pennsylvania, is desirous of acquiring the entire title and interest in the same:

Now, therefore, to all whom it may concern, be it known that for and in consideration of the sum of one dollar ($1.00), to me in hand paid by the said Allen, the receipt of which is hereby acknowledged, I, Andrew J. Culp, have sold, assigned, and transferred, and by these presents do sell, assign and transfer unto the said Alonzo W. Allen, my entire right, title and interest in and to the said patent number 334,569; the same to be held and enjoyed by the said Alonzo W. Allen, for his own use and behoof, and for the use and behoof of his legal representatives, to the full end of the term for which said letters patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

In testimony whereof I have hereunto set my hand and affixed my seal this 4th day of August, A. D. 1892, at Atlantic City, county of Atlantic, State of New Jersey.

ANDREW J. CULP.

In presence of—

CHARLES HORNER.
C. SEELY.

(No Model.)

A. J. CULP & A. W. ALLEN.

WINDING MACHINE.

No. 334,569. Patented Jan. 19, 1886.

Fig. 2.

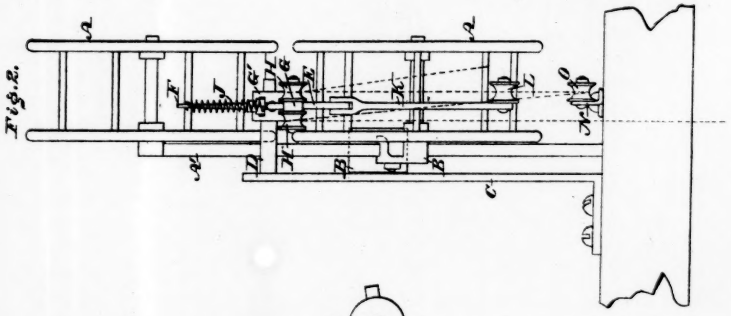


Fig. 1.

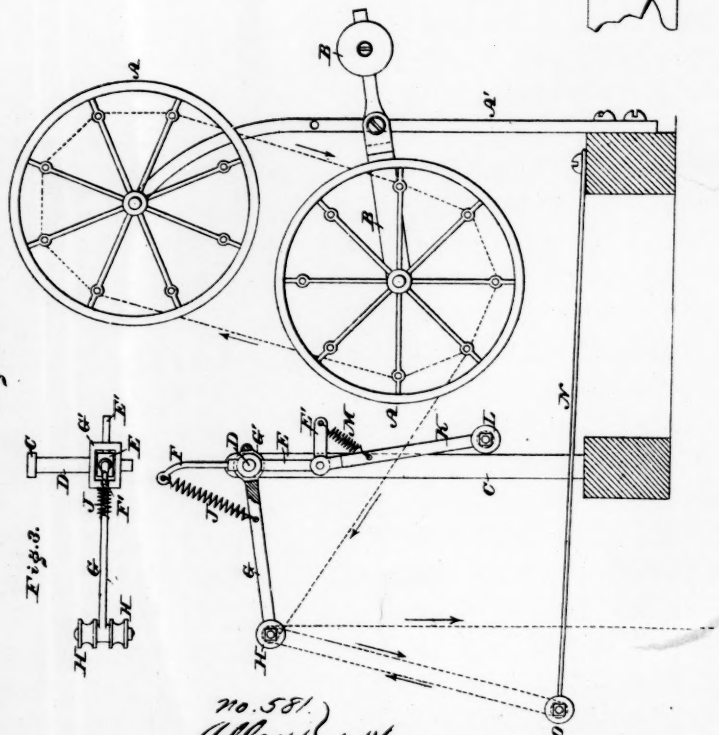


Fig. 3.

No. 581.
Allen } p. 14
Culp }

WITNESSES:
G. P. Grant,
W. F. Fischer

INVENTORS:
A. J. Culp.
A. W. Allen
BY John A. Wiederhein
ATTORNEY.

15 EXHIBIT A.

UNITED STATES PATENT OFFICE.

ANDREW J. CULP and ALONZO W. ALLEN, of Philadelphia, Pa.

Winding-machine.

Specification forming part of Letters Patent No. 334,569, dated January 19, 1886. Application filed December 6, 1884. Serial No. 149,636. (No model.)

To all whom it may concern:

Be it known that we, Andrew J. Culp and Alonzo W. Allen, both citizens of the United States, residing in the city and county of Philadelphia, State of Pennsylvania, have invented a new and useful improvement in winding-machines, which improvement is fully set forth in the following specification and accompanying drawings, in which—

(Here follows diagram marked p. 14.)

Figure 1 represents a side elevation, partly broken away, of a portion of a thread-winding machine embodying our invention. Fig. 2 represents a front view thereof, and Fig. 3 represents a view of a detached portion.

Similar letters of reference indicate corresponding parts in the three figures.

Our invention consists of certain improvements in machines for winding yarn or thread, as will be hereinafter fully set forth, whereby the yarn may be wound with a uniform tension.

The devices may be used in connection with machines such as shown in the patent No. 276,758, granted to J. and T. A. Boyd, May 1, 1883.

Referring to the drawings, A represents a swift formed of two reels, one of which is mounted on a frame or upright, A′, and the other on a gravitating arm, B, which is pivoted to said upright.

C represents an upright or other portion of the frame of the machine, and from the same projects a stud, D, to which is secured an angular arm, E, and on which is mounted a yielding arm, G, the outer end whereof carries two rollers, H.

J represents a spring, which is connected with the arm G and the upward extension F of the arm E, the tendency of which is to raise said arm G.

Pivoted to the lower end of the arm E is an arm, K, the outer end of which carries a roller, L, and connected with said arm K is a spring, M, which is also connected with the limb E′ of the arm E, the object whereof is the elevation of the arm K in the direction toward said limb E′.

N represents a spring-arm, which is connected at one end with a

beam of the machine so as to vibrate the entire length of the arm, the free end of the same carrying a roller, O.

The operation is as follows: A hank or skein is placed on the reels of the swift, and if it is drawn from the lower reel the yarn or thread is passed therefrom around one of the rollers H of the swinging or vibrating arm G, then around the roller O of the spring rod or arm N, and next around the other roller H of the arm G, and finally to the bobbin or cop to be filled or formed. If the yarn is delivered from the upper reel of the swift, having been placed on both reels, as in the operation just described, it is run therefrom around the roller L of the arm K, and then around one of the rollers H, down around the roller O, and finally around the other roller H to the bobbin or cop. In either case the arms G and N or the arms G, K, and N either advance or retract, as may be occasioned by changes in the tension or nature of the yarn or thread, so that the latter is directed to the bobbin or cop in a uniform manner and regular formation of the same is occasioned, besides which the breaking of the yarn or thread is prevented. As the arm N has a large sweep and is elastic throughout, it operates sensitively, and the arms G K, being heavier, move less sensitively, so that there is, in a measure, an equalization of action on the thread. The arms K G are also important features, as they provide in the same machine guides for running off the yarn or thread either from the upper or lower reels of the swift, as has been stated. The vibrating arm G has at its pivotal end a boss, G′, which has a horizontal opening to receive the stud D and vertical opening so as to embrace the portion of the arm E through which the stud passes, it being seen that the stud thus supports the arm E and forms the bearings or axis for the arm G, said arm E also supporting the vibrating arm K and forming connections for the springs J M.

The improvement herein described, as can be readily understood, is easily connected to many varieties of winding-machines, thus adding to their efficiency.

Having thus described our invention, what we claim as new, and desire to secure by letters patent, is—

1. A feeding mechanism for a winding-machine having a swift, a yielding arm carrying two rollers or guides located at one end thereof, an angular arm, and a second yielding arm, the latter being pivoted to the said angular arm, substantially as and for the purpose set forth.

2. The swift A, supported on upright A′, in combination with the upright A′, the yielding arms G and K, angular arm E E′, stud D, standard C, spring-arm N, and springs J and M, substantially as and for the purpose set forth.

3. The swift A, in combination with the yielding arms G and K, having rollers or guides, angular arm E E′, standard C, having stud D, the yielding arm N, having roller or guide, springs J and M, and extension F, substantially as and for the purpose set forth.

4. The swift A, having the upright A′, in combination with a yielding arm, N, carrying a roller, O, yielding arms G and K, having rollers or guides, standard C, having stud D, and angular arm E E′,

having upward extension F, spring J, secured to said extension F and arm G, and spring M, secured to said arm K and part E′ of said angular arm, the said arm G being mounted on said stud D, and the said arm K being pivoted to the angular arm E E′, substantially as and for the purpose set forth.

5. A feeding mechanism for a winding machine, having a swift, A, yielding arms G K, a spring-arm, N, and supports for said swift and arms, and the springs J M, substantially as and for the purpose set forth.

6. A feeding mechanism for a winding-machine, consisting of the swift A, the arms G K, with guides H H and L, the spring J M, the spring-arm N, with guide O, and supports for said swift and arms, substantially as and for the purpose set forth.

7. The yielding arms G K, the angular arm E E′, and springs J M, in combination with the support C, and the stud D, said stud supporting the angular arm E, and forming the bearing for the arm G, substantially as and for the purpose set forth.

ANDREW J. CULP.
ALONZO W. ALLEN.

Witnesses:
JOHN A. WIEDERSHEIM.
A. P. GRANT.

17 And afterwards, to wit, on June 3, 1893, the said defendant made reply to the said declaration or statement of plaintiff's demand, and the same, being filed, is in the following words and figures, to wit:

18 In the Court of Common Pleas, No. 4, for the County of Philadelphia, June Term, 1893.

ANDREW J. CULP
vs.
ALONZO W. ALLEN. } No. 220.

CITY OF PHILADELPHIA, *ss:*

Alonzo W. Allen, the above-named defendant, being duly sworn, deposes and says that he has a just and true defense to the whole of the plaintiff's claim in this action of the following nature and character. He admits that letters patent of the United States were granted to himself and the plaintiff jointly as owners each of an undivided half interest therein on January 19, 1886, as set forth in the statement filed; that at that time he and the said plaintiff were partners in the business of manufacturing cotton and woolen machinery, to improvements in which said patent related; that said partnership was formed prior to 1880 and was dissolved in November, 1886. The said firm made some twenty to twenty-five of said patented machines in the course of its business, and of course the plaintiff received his share of what profit was derived therefrom, not specifically as part owner of said patent, but as a member of the

firm of Culp & Allen; that at the dissolution of said firm in November, 1886, each partner, to wit, the plaintiff and this deponent, retained the title which he originally and always had until that date and that time, each to his undivided half interest in said letters patent, and there was no contract or agreement of any kind or nature whatever which precluded either party, plaintiff or defendant herein, from using his half interest in said letters patent to the full extent permitted by law, nor any agreement or contract that each should account to the other for any profit or loss upon any of such patented machines made by either of them thereafter.

After the dissolution of said firm each party on his individual account continued the same business, deponent having made some of the said patented machines, buth as no knowledge, information, or belief as to whether or not the plaintiff ever made any; that on or about August 4th, 1892, deponent was informed that said letters patent were defective and was advised to reissue the same and to prosecute persons for infringement who were then without license manufacturing the machines or the substantial equivalent of the machines described in said letters patent, but not sufficiently claimed therein; that for the purpose of enabling deponent to apply for a reissue of said letters patent and, if the same were granted, to prosecute infringers thereon, he, on or about the said 4th day of August, 1892, stated to the plaintiff his said desire and intention and requested of him an assignment of his undivided half interest in said patent to enable him, the said deponent, to apply for said reissue and, if granted, to bring suits for infringement thereon. Deponent never made any promise, contract, or agreement with the plaintiff to account to him for any share of any profit which he received on any of said machines made by him individually between the date of the dissolution of the partnership and said 4th day of August, 1892, mainly because he was under no legal obligation to account therefor, but had a full and perfect right to make said machines under his half interest in the patent without any accountability to the plaintiff, his co-owner of said patent; but at the time of obtaining said assignment of the plaintiff's half interest he did promise and agree to and with the plaintiff that in consideration of said assignment he would apply for said reissue at his own expense and, if granted, would prosecute infringers at his own expense, and, if he recovered anything over and above expenses, he would account for and pay over to the plaintiff an equal half part of such surplus or net profit received.

19 The plaintiff then made said assignment to deponent, who thereupon placed the matter in the hands of his patent agents and proceeded in good faith to apply for a reissue of said patent, which application was filed in the Patent Office of the United States on November 18th, 1892, and which application is still pending and undetermined; and deponent is advised by counsel that the said application for reissue will be without avail to him and was unadvisedly made.

And deponent further says that the said patented invention is of comparatively minor importance, and that if at any time the plain-

tiff had expressed a dissatisfaction with the deponent's course of proceedure he would and is now willing to withdraw the said application for reissue and reassign to the plaintiff his half interest in said letters patent.

All of which is true, and deponent expects to be able to prove the same on the trial of this cause.

ALONZO W. ALLEN.

Sworn and subscribed to before me this second day of June, A. D. 1893.

FRANK S. BUSSER,
Notary Public.

Endorsed: "Affidavit of defense. Filed June 5th, 1893. C. H. White, *pro* proth'y. H. T. Fenton, *pro* def't."

20 And afterwards, to wit, on June 9, 1893, the said defendant made his plea in the words following, to wit:

Defendant pleads :non-assumpsit, payment, set-off, with leave to give the special matter in evidence.

H. T. FENTON,
Att'y for Defendant.

And afterwards, to wit, on May 2, 1894, a jury being called, duly empanelled, and sworn to try the issue joined, do say that they find for the plaintiff and assess the damages at two hundred and twenty-five dollars.

And afterwards, to wit, May 5, 1894, the defendant, by his attorney, moved for a rule for new trial and filed reasons in support thereof in the following words, to wit:

21 *Reasons.*

1st. Because the verdict was against the evidence, which was uncontradicted to the effect that the defendant had never made or sold any tension devices covered by the claims of the patent in question and as exemplified in the model produced and identified as the tension device patented.

2nd. Because the verdict was against the charge of the court, which was to the effect that unless the tension devices made and sold by the defendant were substantially similar to the patented devices as to be within the monopoly created by the patent that the plaintiff was not entitled to recover.

3rd. Because the verdict was against the law, the court being in error in its charge to the jury in answer to the plaintiff's 2nd and 4th points to the effect that a surrender of the patent on the subsequent joint application of parties for a reissue thereof had no effect upon the validity of the original patent until the reissue was granted nor any effect upon the contract in suit between the plaintiff and defendant in reference thereto.

22 And afterwards, to wit, on June 5, 1894, the cause having been heard upon the motion of defendant for a new trial and reasons in support thereof, it is considered that *that* a new trial be refused; and thereupon, on June 12, 1894, it is adjudged that the plaintiff, Andrew J. Culp, do have and recover of Alonzo W. Allen, defendant, the sum of two hundred and twenty-five dollars, together with costs.

23 *Bill of Exceptions.*

In the Court of Common Pleas, No. 4, of Philadelphia County, of June Term, 1893.

ANDREW J. CULP
vs.
ALONZO W. ALLEN. } No. 220.

Be it remembered that in the said term of June, 1893, came the said plaintiff into the said court and impleaded the said defendant in a certain plea of assumpsit, &c., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut pleas*); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court held at the county aforesaid, before the Honorable M. Russell Thayer, president judge of the said court, the second day of May, 1894, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impanelled (*pro ut* list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial, the counsel of the said plaintiff having offered evidence in support of the affirmative of said issue, the counsel for the said defendant, *inter alia*, offered in evidence a certified copy, under the seal of the Patent Office of the United States, of the file and contents of the application for reissue of the letters patent No. 334,569 in question, and also, after due proof of identification, of a sample or model of the tension devices made and sold by defendant.

24 *Points Submitted to the Court by the Parties.*

The following points, *inter alia*, were presented in writing to the court by the parties respectively with a request to charge thereupon:

2nd. (Submitted by plaintiff and affirmed.) Where the reissue of letters patent of the United States is applied for, the surrender takes effect only upon the issue of the amended patent, and if the reissue is refused the original patent is returned to its owners.

4th. (Submitted by plaintiff and affirmed.) The action of the Patent Office in refusing to reissue the patent in suit, did not effect

its validity, and the contract between the plaintiff and defendant in reference thereto was not rendered invalid by such action.

5th. (Submitted by defendant and refused.) If, after the alleged making by the defendant of a promise to account to the plaintiff for past profits on the patented machines previously manufactured by the defendants, the parties joined in a surrender of the patent and an application for a reissue thereof, such act amounts in law to an extinguishment of the patent and to a legal cancellation of any claim based thereon for profits on the patented machines made prior to that date.

6th. (Submitted by defendant and refused.) The joint act of the parties in surrendering the patent in question, and applying for a reissue thereof, on November 18, 1892, amounted to a cancellation of the patent, and being followed by a refusal on the part of the Government to grant the reissue, operated to end and determine the contract sued upon as to any of the patented machines made after such surrender.

Charge of the Court.

25 THAYER, *P. J.*:

GENTLEMEN OF THE JURY: It appears by the evidence that the plaintiff and defendant were the joint owners and patentees of a certain invention which is described in the patent as being an improvement in winding machines. The plaintiff made an assignment of his half interest in that patent to the defendant. The alleged consideration for that transfer of his half interest was, according to the testimony which the plaintiff has produced, a promise on the part of the defendant that he would divide with him all profits made by the sale of that device of which they were the joint owners, and also, all damages which might be recovered against people who infringed that patent. That is the contract now sued upon. The plaintiff in his statement of his cause of action declares that the defendant promised to pay him one-half of all that he, the defendant, had made "out of said patent" in the past and also one-half of all that he should make in the future, whether profits of manufacture or damages from infringers. That is the plaintiff's statement of his case against the defendant. Then he goes on to charge that the defendant has neglected and failed to account to him for one-half of the profits made from the patent before and since the assignment.

With regard to the damages for infringement there is no evidence which would justify you in finding anything on that score at all, because it does not appear that the defendant ever made any profit out of suits against infringers. The question is whether the defendant has made any, and if so what profit out of the patent of which he was the joint owner with the plaintiff; that is, the improved winder for which they held a patent. If the defendant has made any profit out of the manufacture and sale of that device patented, he must account for one-half of the net profits to the plaintiff. If he has made nothing he has to account for nothing. You are to

decide whether he has made anything out of that device or not, and if he has made anything, what, and if you find that he has made anything, you are to divide it by two and give one-half of it to the plaintiff. Thus far the case is free from all difficulty. The em-
26 barrassment, if there be one in the case, arises out of the allegation that the device which was really manufactured and sold by the defendant was a totally different one from that which was patented by the plaintiff and the defendant; that it was different in its parts and in its arrangements and that it was a distinct and independent invention. If that is so, of course the plaintiff cannot recover anything from the defendant for the sale of such a device. So that you will have to enter into the question whether these two machines which have been exhibited to you are essentially the same or not. If they are not essentially the same, then you are to return a verdict for the defendant in this case unless you should find that he made some profit before the assignment. Whether there is any evidence upon that subject I do not recall, but perhaps your memory will be better, upon that subject, than mine. If there is any such evidence you will consider it. If there is not, you will not be troubled by considering it. If these two machines are essentially the same, then the defendant is to account to the plaintiff for one-half of what he made by the invention.

If they are essentially different, he is to account for nothing. What is he to account for, if you should find perchance that they are essentially the same? Is he to account for one-half of profits of the whole winding machine, calculating its cost and then subtracting that from the selling price of the machine, or is he entitled only to the profits of that portion of the machine which contained the device which was the subject of the joint patent? There is a principle in the patent law which has been applied in the case of infringement, (I do not know whether it has ever been applied in a case like this, I suppose it could be properly applied to a case like this, if you should find the facts which would justify you in applying it,) viz., that where a device which is patented is so essential to the machine that it could not exist without it, could not be worked without it in any way, in other words, is so practically useless without it that the whole value of the machine consists in the patented device, there it is the difference between the cost and selling price of the whole machine which is to be made the criterion of damages for an infringement, and, I suppose, it would also be a cri-
27 terion for measuring the damages to be awarded in such a case as this. But where the device is a device in which the usefulness of the machine does not wholly depend upon it, where it is not the machine itself, that is to say, where a winding machine could be made perfectly good without such a device as this, there you could not, with any propriety, in settling this matter between the plaintiff and the defendant, if you should find a verdict for the plaintiff, award him one-half the profits of the entire machine, but you would be confined to awarding him, so far as you could get at it, one-half the profits made on the particular device which was the subject of his patent, ascertaining the cost of what is called the ten-

sion and the selling price of the tension, if you can do so from the evidence, and giving the plaintiff one-half of the profit made upon all sales.

Whether you are to award the plaintiff anything, at all depends, it seems to me, mainly upon whether you shall consider that these two things are one and the same invention or not. There are witnesses who have been examined who are familiar with such machines who say they are totally distinct and different, that the elements of the two devices are not the same. If you should agree with them and find that this is a totally distinct invention, which the defendant has been selling, from the one which was patented, then you ought to find a verdict for the defendant.

I have been requested by the plaintiff to instruct you, "1. If the jury find from the evidence, that the defendant promised to pay the plaintiff half of what he had made out of patent No. 334,569, and half of what he should make out of it in the future, in consideration of the plaintiff's assigning to him, his half interest in this patent, and moreover, that the defendant has made some profit therefrom, they cannot consider the adequacy of the consideration, but must render a verdict for the plaintiff."

I substantially affirm this point. I instruct you that the consideration of the contract is proven in this case to have been the transfer of the half ownership of the plaintiff in the patent, and I will say to you that that was a good and valid consideration for the promise which the defendant made, if he did make it.

28 "2. Where the reissue of letters patent of the United States is applied for, the surrender takes effect only upon the issue of the amended patent, and if the reissue be refused, the original patent is returned to its owners."

I cannot say about "returning to the owners." I do not know what the practice of the Patent Office is in relation to that, but I affirm this point so far as to say that the refusal of the reissue does not by law necessarily invalidate the old patent.

"3. The action of the Patent Office of the United States, in refusing to reissue a patent is not final, as the applicant has the right to appeal to the supreme court of the District of Columbia."

I believe the law to be so.

"4. The action of the Patent Office in refusing to reissue the patent in suit, did not affect its validity, and the contract between the plaintiff and defendant in reference thereto was not rendered invalid by such action."

I have already so instructed you. I affirm that point.

"5. As the defendant has admitted in his affidavit of defense, that he has manufactured some machines covered by the patent in suit since November, 1886, he is estopped from denying that fact, and if the jury find from the evidence that all the cop-winders sold by the defendant since that date were practically identical, the plaintiff is entitled to recover on all such machines."

If you find as assumed in this point then the plaintiff would be entitled to recover half of all profits made by the defendant out of

the patent of which they were, previous to the assignment, joint owners.

"6. If the jury find that the defendant has marked, advertised and sold his cop-winders to the public as covered by the patent of January 19, 1886; that he has used the name of this patent to keep off competitors and has derived all the advantages therefrom, he cannot now deny that these machines came within the claims of the patent and the plaintiff is entitled to recover on all such machines."

I refuse that point.

29 "7. If the jury find that the entire value of these machines as marketable articles was properly attributable to the tension device used upon them, and that they would not have been saleable without this tension, the plaintiff is entitled to recover one-half of the profits made on these machines."

As I have already stated, that is so, if the tension referred to was the device described in the original patent of which the plaintiff was half owner, but if the tension sold was a totally different invention—a different machine and not essentially the same, then your verdict ought to be for the defendant on that point.

"8. If the jury find that the defendant, by marking the machine itself and not the tension, as patented January 19, 1886, and by advertising the machine itself as a patented cop-winder, sought to induce his customers to believe that the whole cop-winder purchased by them was covered by this patent, the plaintiff is entitled to recover half the profits made upon the whole machine."

I refuse that point.

"9. The profit on each machine is the difference between the selling price and the cost of its manufacture."

As a question of law I affirm that point.

"10. If the jury find from the evidence that the defendants' cop-winder did not derive its entire market value from the patented tension, but would have been saleable without it, the plaintiff is entitled to recover such proportion of the profits as were derived from the tension devices, as distinct from the rest of the machine. In such cases the selling price of the tensions is the price received for the cop-winder, less what it would have brought in open market with the tensions. Their cost is the difference in the expense of making the cop-winder with them and without them, the profit being the difference between the price and cost thus ascertained."

I think I have already sufficiently instructed you upon that subject. I have told you that if the machine which the defendant made is a machine which could have been operated without this invention, then you are not, in any event, to award damages

30 upon the basis of the difference between the cost of the entire machine and the selling price. But if you should be of the opinion that the machine that the defendant sold was this machine which was patented, even if it was not essential to the whole machine, then the plaintiff would be entitled to such profit as would be represented by the difference between the cost and the selling price of the tension, which is the subject of the first patent. If the

second is a different thing, and if that is what the defendant made then of course your verdict should be for the defendant.

The defendant has asked me to instruct you,

"1. There is no liability on the part of owners of undivided interests in a patent to account to each other for the use by either of the patented invention, and any promise by one to account to the other for such use unless supported by some consideration other than that arising merely out of their relations as joint owners of the patent, is without consideration and void."

There is a general principle of the law of patents that where there are joint owners in the patent, either of them can use it to any extent he pleases without being obliged to account to any other for what he has received for the use or sale of it. Nevertheless, I instruct you that if you find the defendant made the promises alleged in the plaintiff's statement, to account to him for one-half of the profit, in consideration of the former transfer of the plaintiff's interest in the patent to the defendant, that is a good consideration to maintain this action.

"2. The contract sued upon relates only to tension devices covered by the patent in question, hence if the devices made and sold by defendant did not come within the purview of the claims of that patent they are not to be accounted for by him."

I affirm that point. I have already so instructed you.

"3. The patent in question was for a tension device consisting of several specified elements in combination; and if the tension devices made and sold by defendant did not include an essen-
31 tial element of the described combination, then they are to be considered as substantially different from the patented device and not within the patent."

I affirm that point. If it is a different device it is not the same device.

"4. If you believe that the tension devices made and sold by the defendant after November 1, 1886, were substantially different from the tension device described and claimed in the patent in question, the plaintiff cannot recover, even though the parties at the time of the making of the alleged contract supposed that the devices in question previously made and sold by defendant were covered by the patent."

I affirm that point.

"5. If, after the alleged making by the defendant of a promise to account to the plaintiff for past profits on the patented machines previously manufactured by the defendant the parties joined in a surrender of the patent and an application for a reissue thereof, such act amounts in law to an extinguishment of the patent and to a legal cancellation of any claim based thereon for profits on the patented machine made prior to that date."

I refuse that point.

"6. The joint act of the parties in surrendering the patent in question, and applying for a reissue thereof, on November 18, 1892, amounted to a cancellation of the patent, and being followed by a refusal on the part of the Government to grant the reissue, operated

to end and determine the contract sued upon as to any of the patented machines made after such surrender."

I refuse that point.

Defendant's counsel excepted to the refusal of the learned judge to charge as requested in the fifth and sixth points presented by him.

Also excepted to the learned judge affirming the plaintiff's second point, and to the answer of the court to the plaintiff's fourth point.

32 And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said court in the particulars noted, to wit, in affirming plaintiff's 2nd and 4th points and refusing defendant's fifth and 6th points, and inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such cases made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the said defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 14th day of May, 1894.

(Signed) M. RUSSELL THAYER. [L. S.]
—— ——. [L. S.]

33 D'F'T'S EXHIBIT REISSUE FILE.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the records of this office of the file-wrapper, contents, and drawing in the matter of the reissue application of Andrew J. Culp and Alonzo W. Allen, said Culp assignor to said Allen, filed November 18, 1892, serial number 452,451, for improvement in winding machines.

In testimony whereof I, John S. Seymour, Commissioner of Patents, have caused the seal of the Patent Office to be affixed this 6th day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

JOHN S. SEYMOUR,
[SEAL.] *Commissioner.*

Amount received, $30.00; O K., chief clerk.

PHILADELPHIA, *Nov.* 17, 1892.

Hon. Commissioner of Patents.

SIR: I send herewith the complete application of Andrew J. Culp and Alonzo W. Allen for the reissue of letters patent No. 334,569, January 19, 1886. I enclose also a certified abstract of title of the

said patent, and also the original letters patent, and a check for $30.00 in payment of Government fee.

Very truly, R. M. HUNTER.

(E. H. H.)

4 inclosures.

To the Commissioner of Patents:

Your petitioners, Andrew J. Culp and Alonzo W. Allen, residents of Philadelphia, county of Philadelphia, and State of
34 Pennsylvania, pray that they may be allowed to surrender the letters patent for an improvement in winding machines, granted to them on January 19th, 1886, whereof Alonzo W. Allen, on whose behalf and with whose assent this application is made, is now sole owner, by assignment, and that letters patent may be reissued to the said Alonzo W. Allen for the same invention, upon the annexed amended specification; and they hereby appoint Andrew O'Neill and Joshua Matlack, Jr., of the city of Philadelphia, and State of Pennsylvania, as their attorneys, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith. With this petition is filed an abstract of title, duly certified, as required in such cases.

ANDREW J. CULP.
ALONZO W. ALLEN.

The undersigned, assignee of the entire interest in the above-mentioned letters patent, hereby assents to the accompanying application.

ALONZO W. ALLEN.

Ernest Howard Hunter, of 926 Walnut street, Philadelphia, Pennsylvania, is hereby authorized to act as associate counsel in the matter of this application.

ANDREW O'NEILL.
JOSHUA MATLACK, JR.

To all whom it may concern:

Be it known that we, Andrew J. Culp and Alonzo W. Allen, both citizens of the United States, residing in the city and county of Philadelphia, State of Pennsylvania, have invented a new and useful improvement in winding machines, which improvement is fully set forth in the following specification and accompanying drawings, in which—

Fig. 1 represents a side elevation, partly broken away, of a portion of a thread-winding machine embodying our invention.

Fig. 2 represents a front view thereof; and
35 Fig. 3 represents a view of a detached portion.

Similar letters of reference indicate corresponding parts in the three figures.

Our invention consists in certain improvements in machines for

winding yarn or thread, as will be hereinafter fully set forth, whereby the yarn may be wound with a uniform tension.

The devices may be used in connection with machines such as shown in patent No. 276,758, granted to J. and T. A. Boyd, May 1, 1883.

Referring to the drawings, A represents a swift, formed of two reels, one of which is mounted on a frame or upright, A, and the other on a gravitating arm, B, which is pivoted to said upright.

C represents an upright or other portion of the frame of the machine, and from the same projects a stud, D, to which is secured an angular arm, E, and on which is mounted a yielding arm, G, the outer end whereof carries two rollers or guides, H.

J represents a spring, which is connected with the arm, G, and the upward extension, F, of the arm, E, the tendency of which is to raise said arm, G.

The parts C, D, E, F, constitute a frame extending upward from the framework of the machine and overhanging or projecting laterally with respect to the pivot point of the arm, G, so as to bring the upper support of the spring, J, at a distance from the hinge point. The object of this is evident, as it is readily perceivable that under such a construction the arm, G, may vibrate through a large angle without materialy varying the effective power of the tension spring. The spring is thus sustained in the best operative position. Under this action the cop or bobbin may be wound under a practically uniform tension when the yarn passes directly from the swift, A, over the guide, H, to the cop or bobbin.

Pivoted to the lower end of the arm, E, is an arm, K, the outer end of which carries a roller, L, and connected with said arm, K, is a spring, M, which is also connected with the limb, E, of the arm, E, the object whereof is the elevation of the arm, K, in the direction toward said limb, E.

N represents a spring arm, which is connected at one end with a beam of the machine so as to vibrate the entire lenth of the arm, the free end of the same carrying a roller, O.

36 Where the yarn is more delicate and a more sensitive tension is required, the yarn may be wound in connection with spring arm, N, as shown.

It is quite evident that any suitable grooved guides may be used for the grooved rollers, H, O and L, such as grooved porcelain guides, which were well known as mechanical equivalents for grooved rollers in textile machinery.

The operation is as follows for delicate yarns: A hank or skein is placed on the reels of the swift, and if it is drawn from the lower reel the yarn or thread is passed therefrom around one of the rollers, H, of the swinging or vibrating arm, G, then around the roller, I, of the spring arm or rod, N, and next around the other roller, H, of the arm, G, and finally to the bobbin or cop to be filled or formed. If the yarn is delivered from the upper reel of the swift, having been placed on both reels, as in the operation just described, it is run therefrom around the roller, L, of the arm, K, and then around one of the rollers, H, down around the roller, O, and finally

around the other roller, H, to the bobbin or cop. In either case the arms, G and N, or the arms, G, K and N, either advance or retreat, as may be occasioned by changes in the tension or nature of the yarn or thread, so that the latter is directed to the bobbin or cop in a uniform manner and regular formation of the same is occasioned, besides which the breaking of the yarn or thread is prevented. As the arm, N, has a large sweep and is elastic throughout, it operates sensitively, and the arms, G and K, being heavier, move less sensitively, so that there is, in a measure, an equalization of action on the thread. The arms, K and G, are also important features, as they provide in the same machine guides for running off the yarn or thread either from the upper or lower reels of the swift, as has been stated.

The vibrating arm, G, has at its pivotal end a boss G, which has a horizontal opening to receive the stud, D, and vertical opening so as to embrace the portion of the arm, E, through which the stud passes, it being seen that the stud thus supports the arm, E, and forms the bearings or axis for the arm, G, said arm, E, also supporting the vibrating arm, K, and forming connections for the springs, J and M.

37 This construction makes the parts, C, D, E, F, constitute a bent bracket or inverted L-shaped frame to the overhanging or laterally projecting part to which the spring, J, is connected. It permits the spring, J, to be placed well out upon the arm, G, or at a distance from the hinge, and thereby be sensitive while exerting a well-defined tension upon the yarn guided over the guide, H, at the free end of the arm, G. For ordinary yarns the tension device comprised in the overhanging frame, the pivoted lever, G, hinged to the frame and having a guide for the yarn at its free end, and a tension spring between the pivoted arm, G, and overhanging or laterally projecting part of the frame, is all that is required or used in practice, as it is found amply adequate to the objects of the invention. The general structure of the overhanging frame is immaterial and may be made in any suitable manner so long as it performs its functions herein set out and coacts with the parts, G and J, substantially in the manner described.

The improvement herein described, as can be readily understood, is easily connected to many variations of winding machines, thus adding to their efficiency.

We do not confine ourselves to the mere details of construction, as they may be modified without departing from the essential features of the invention.

Having thus described our invention, what we claim as new, and desire to secure by letters patent is:

1. A feeding mechanism for a winding machine having a swift, a yielding arm carrying two rollers or guides located at one end thereof, an angular arm, and a second yielding arm, the latter being pivoted to the said angular arm, substantially as and for the purpose set forth.

2. The swift A, supported on upright A′, in combination with the upright A′, the yielding arms G and K, angular arm E E′, stud D,

standard C, spring arm N, and springs J and M, substantially as and for the purpose set forth.

3. The swift A, in combination with the yielding arms G and K having rollers or guides, angular arms E E', standard C, having stud D, the yielding arm N having roller or guide springs J and
38 M, and extension F, substantially as and for the purpose set forth.

4. In a feeding mechanism for a winding machine having a swift, the combination of a stationary upright bracket or frame having an overhanging or laterally projecting part, a yielding pivoted arm hinged to the bracket or frame and provided with a yarn guide at its free end to receive and guide the yarn coming from the swift, and a tension spring connected at one end to the yielding arm at a distance from the hinge or pivot and at the other end to the overhanging or projecting portion of the bracket frame.

5. A feeding mechanism for a winding machine, having a swift A, yielding arms G, K, a spring arm N, and supports for said swift and arms, and the springs J M, substantially as and for the purpose set forth.

6. A feeding mechanism for a winding machine consisting of the swift A, the arms G K, with guides H H and L, the springs J M, the spring arm N, with guide O, and supports for said swift and arms, substantially as and for the purpose set forth.

7. In a feeding mechanism for a winding machine a swift, in combination with a tension device for delivering the yarn to the bobbins or cops under uniform tension consisting of a stationary frame, a tension arm pivoted thereto and having a yarn guide at its free end, and a spring interposed between the stationary frame and pivoted tension arm arranged to maintain a substantially uniform tension of the yarn for considerable angles through which the pivoted tension arm moves.

In testimony of which invention, we have hereunto set our hands.

ANDREW J. CULP. [SEAL.]
ALONZO W. ALLEN. [SEAL.]

Witnesses:
JOHN McCAFFREY.
HARRY A. WAMBOLD.

39 STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss:

Andrew J. Culp and Alonzo W. Allen, the above-named petitioners, being duly sworn, depose and say that they verily believe themselves to be the original and first inventors of the improvement set forth and claimed in the foregoing specification and for which improvement they solicit a patent, that deponents do not know and do not believe that said improvement was ever before known or used; that deponents are citizens of the United States of America, and reside at Philadelphia, in the county of Philadelphia, and State of Pennsylvania; that deponents verily believe that the letters patent referred to in the foregoing petition and specification and

herewith surrendered are inoperative or invalid, for the reason that the specification thereof is defective and insufficient, and that such defect and insufficiency exists because it failed to properly describe and claim the essential and most important features of the invention so as to give one skilled in the art a clear understanding and conception of the real nature and full advantages of the invention; and deponents further say that the errors which render such patent so inoperative or invalid arose from inadvertence, accident and mistake, and without any fraudulent or deceptive intention on the part of deponents; that the following is a true specification of the errors which it is claimed constitute such inadvertence, accident and mistake relied upon: The defects mainly consist in that the specification fails to describe the invention other than to make it appear that all of the various parts must be employed at one and the same time and under all circumstances, whereas, as a matter of fact, the apparatus is adapted to adjustment for yarns of various tensile strengths, the several tension devices only being used with the most delicate yarns, and only a portion of said parts used in winding the coarser or most ordinary yarns. The advantages, method of use, and general construction were incompletely set out and claimed, and gave but a partial understanding of the capacity and use of the invention. That such errors so particularly specified arose through inadvertence, accident and mistake, and without any fraudulent or deceptive intention on their part. That deponents are practical men, not versed in the reading of patents or in interpreting the proper legal construction to be given to the patents, and that the errors arose from the fact that deponents unknowingly failed to make clear to their attorney the exact advantages, use and construction of the invention, and the attorney failed to properly describe and claim the invention. Deponents further aver that until within several weeks past they were not aware of the defective condition and the insufficiency of the specification and claims of their patent, and were so informed by other counsel who had occasion to examine the said letters patent to ascertain whether or not it protected the real invention. That immediately upon being satisfied of the defects and errors in the patent, deponents at once took steps looking to the filing of the present reissue application.

ANDREW J. CULP. [SEAL.]
ALONZO W. ALLEN. [SEAL.]

Sworn and subscribed to before me this fourteenth day of November, 1892.

[L. S.] FRANCIS A. FLOOD,
Notary Public.

United States Patent Office.

To all persons to whom these presents shall come, Greeting:

This is to certify that the annexed is a true copy from the digest of this office of all assignments, agreements, licenses, powers of attorney, and other instruments of writing, found of record up to and

including November 7, 1892, under or relating to letters patent granted to Andrew J. Culp and Alonzo W. Allen, January 19, 1886, winding machine.

In testimony whereof I, W. E. Simonds, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this eleventh day of November, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States of America the one hundred and seventeenth.

W. E. SIMONDS,
Commissioner.

41 A. L. J. Assignor, Andrew J. Culp; assignee, Alonzo W. Allen, Philadelphia, Pa.; date of assignment, August 4, 1892; date of record, August 11, 1892; invention, winding machines, January 19, 1886, 334,569; territory assigned, his entire right, title and interest, an undivided half in said letters patent to the end of the term, for which they are or may be granted; consideration, $1.00; liber, M 46; page, 100.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *December* 12, 1892.

Mailed December 12, 1892.

Subject: Winding machines. Filed November 18, 1892. No. 452,451.

A. J. Culp and A. W. Allen, care Ernest H. Hunter, No. 926 Walnut street, Philadelphia, Pa.:

Please find below a communication from the examiner in charge of the application above noted.

W. E. SIMONDS,
Commissioner of Patents.

The reissue applied for is refused on the ground that there was an unreasonable delay from the date of the original patent until the filing of the reissue application. It has been held in numerous decisions by the Supreme Court of the United States that the application for a reissue must be made within a reasonable time after the original patent was granted, and that a delay of more than two years in applying for such reissue generally requires special circumstances for its excuse. See Miller *vs.* Brass Co., 21 O. G., 201; 104 U. S., 350; Mahn *vs.* Harwood, 30 O. G., 657; 112 U. S., 354; and Topliff *vs.* Topliff, 59 O. G., 1257. In this case there has been a delay of six years and ten months, which is obviously an unreasonable time.

A further reason for refusing the reissue is that the new claims, 4 and 7, are unpatentable. British patent to Robertson *et al.*,
42 No. 3427, October 22, 1873 (cordage—winding bobbins, weft wind), and United States patent to Franz and Pope, No. 123,687, February 13, 1872 (knitting and netting—take-ups and

tensions), each present a substantial anticipation of claims, 4 and 7, which are accordingly rejected.

In order to put claims 2, 3, 5 and 6 in proper form, the structural relation and connection of the various elements should be set forth.

ROBT P. HAINS, *Examiner.*

F. W. W.

No. 2041 PARK AVENUE, PHILADELPHIA, *February* 7, 1893.

Hon. Commissioner of Patents.

SIR: I hereby cancel the power of attorney heretofore given by me to Andrew O'Neill and Joshua Matlack, Jr., or either of them, to prosecute my application for reissue of patent to Culp & Allen, dated January 19, 1886, No. 334,569, said reissue application having been filed in September or October, 1892, the serial number of which I do not know, as the papers are all in the hands of the aforesaid attorneys, who have declined to give them to me, and I hereby request that any communication by the office hereafter be directed to my address, No. 2041 Park avenue.

Respectfully, ALONZO W. ALLEN.

UNITED STATES PATENT OFFICE.

In re application of ALONZO W. ALLEN.

Serial No. 452,451. Filed November 18, 1892.

Improvement in Winding Machine.

Hon. Commissioner of Patents.

SIR: I, Alonzo W. Allen, the applicant named in the above entitled reissue application now pending, do hereby appoint
43 Hector T. Fenton, No. 903 Walnut street, city of Philadelphia, State of Pennsylvania, my attorney, with full power of substitution and revocation to prosecute this application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

Signed by me at Philadelphia, June 2, 1893.

ALONZO W. ALLEN.

UNITED STATES PATENT OFFICE.

In re application of ALONZO W. ALLEN.

Serial No. 452,451. Filed November 18, 1892.

Improvement in Winding Machines.

For reissue of original patent No. 334,569, dated January 19, 1886.

Examiner's room No. 93.

Hon. Commissioner of Patents.

SIR: Office letter of December, 1892, stating reasons for the rejection of this reissue application, has been received and carefully

considered. With respect to claims 1, 2, 3, 5 and 6, it is called to attention that these claims in the reissue application are identical, as well in phraseology as in substance, with the claims similarly numbered in the original patent. The two other claims, numbers 4 and 7, are substitutes for similarly numbered claims in the original patent. Hence this application is manifestly solely for the purpose of amending said two original claims, 4 and 7, in the manner set forth in this reissue application. The reasons for the six years' delay in surrendering this patent for correction in respect of these claims, are clearly set forth in the oath accompanying this application, and afford, it is thought, a legal excuse for the apparent laches.

The office is therefore respectfully requested to reconsider its action rejecting a reissue on said amended claims.

Respectfully, H. T. FENTON,
Attorney for Applicant.

October 3, 1893.

44 DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
J. W. H. WASHINGTON, D. C., *October* 11, 1893.

Mailed October 11, 1893.

Subject: Winding machine. Filed November 18, 1892. No. 452,451.

A. J. Culp and A. W. Allen, care H. T. Fenton, No. 903 Walnut St., Philadelphia, Pa.:

Please find below a communication from the examiner in charge of the application above noted.

JOHN S. SEYMOUR,
Commissioner of Patents.

This case has been given careful reconsideration. The previous action in the case is hereby repeated. As soon as the formal objection against claims 2, 3, 5 and 6 are overcome, claims 4 and 7 will be finally rejected on the references of record and the whole case finally rejected on the ground of unreasonable delay in applying for the reissue, such delay not being satisfactorily accounted for.

ROB'T P. HAINS, *Examiner.*

F. W. W.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
WASHINGTON, D. C., *October* 14, 1893.

Mailed October 14, 1893.

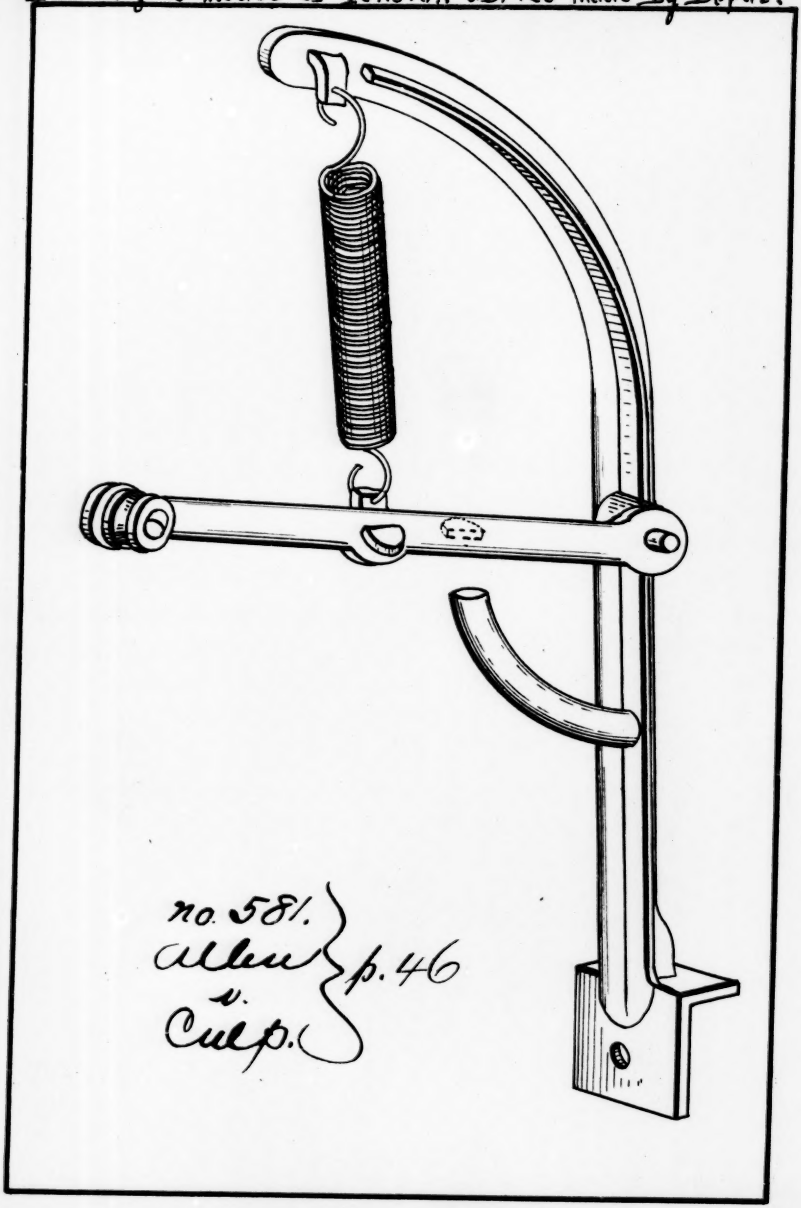
Subject: Winding machines. Filed November 18, 1892. No. 452,451.

A. J. Culp and A. W. Allen, care Hector T. Fenton, No. 903 Walnut St., Philadelphia, Pa.:

Please find below a communication from the examiner in charge of the application above noted.

JOHN S. SEYMOUR,
Commissioner of Patents.

Drawing of model of Tension device made by Defdt.



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45 In addition to the reasons stated in the last office letter, claims 4 and 7 are rejected for the reason that said claims are an unwarrantable expansion of the claims originally in the case. All the other grounds of rejection and the formal objections raised in the last office letter are adhered to.

ROBT P. HAINS, *Examiner.*

F. W. W.

Serial number 452,451. 1892. Examiner's Book, 122–844. No. —. Reissue.

Andrew J. Culp and Alonzo W. Allen, said Culp ass'or to said Allen, of Philadelphia, county of Philadelphia, State of Pennsylvania. Invention, winding machines.

Parts of application filed: Petition, November 18, 1892; affidavit, November 18, 1892; specification, November 18, 1892; drawing, November 18, 1892; old patent, November 18, 1892. Abstract of title, November 18, 1892; cert. dep. —; cash, $30, November 18, 1892; application filed complete, November 18, 1892; number and date of original patent, 334,569, January 19th, 1886; examined, —.

Class, —. 1892.

Contents.

One-half application, three papers. 1. Rejection, December 12, 1892. 2. Rev. and power of attorney, February 8, 1893. 3. Power of attorney, June 3, 1893. 4. Argument, October 4, 1893. 5. Letter, October 11, 1893. 6. Letter, October 14, 1893. 16. 28, cordage, winding bobbins; 2, weft wind.

Title: Improvement in —.

M. A. O., J. F. F.

(Here follows diagram marked page 46.)

47 Supreme Court of Pennsylvania, of July Term, 1894.

ANDREW J. CULP
vs.
ALONZO W. ALLEN, Defendant and Appellant. } No. 138.

And now, January 7, 1895, comes Alonzo W. Allen, by H. T. Fenton, his attorney, and assigns the following errors in the rulings and judgment of the trial court:

I. The court below erred in affirming the plaintiff's 2nd point, which was as follows:—(Submitted by plaintiff and affirmed.) "Where the reissue of letters patent of the United States is applied for, the surrender takes effect only upon the issue of the amended patent, and if the reissue is refused the original patent is returned to its owners."

II. The court below erred in affirming the plaintiff's 4th point, which was as follows:—(Submitted by plaintiff and affirmed.) "The action of the Patent Office in refusing to reissue the patent in suit, did not affect its validity, and the contract between the plaintiff and

defendant in reference thereto was not rendered invalid by such action."

III. The court below erred in refusing to affirm defendant's 5th point, which was as follows:—(Submitted by defendant and refused.) "If, after the alleged making by the defendant of a promise to account to the plaintiff for past profits on the patented machines previously manufactured by the defendant, the parties joined in a surrender of the patent and an application for a reissue thereof, such act amounts in law to an extinguishment of the patent and to a legal cancellation of any claim based thereon for profits on the patented machines made prior to that date."

IV. The court below erred in refusing to affirm defendant's 6th point, which was as follows:—(Submitted by defendant and refused.) "The joint act of the parties in surrendering the patent in question, and applying for a reissue thereof, on November 18, 1892, amounted to a cancellation of the patent, and being followed by a refusal on the part of the Government to grant the reissue, operated to end and determine the contract sued upon as to any of the patented machines made after such surrender."

48 EASTERN DISTRICT OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

The Commonwealth of Pennsylvania to the justices of the court of common pleas, No. 4, for the county of Philadelphia, Greeting:

We, being willing for certain causes to be certified of the matter of the appeal of Alonzo W. Allen from judgment of said court in the case in said court wherein the above-named appellant was defendant and Andrew J. Culp, appellee, was plaintiff, of No. 220, June term, 1893, before you or some of you depending, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the twelfth day of June, in the year of our Lord one thousand eight hundred and ninety-four.

CHAS. S. GREENE,
Prothonotary.

49 [Endorsed:] C. P. No. 4. No. 220. June term, 1894, supreme court. Andrew J. Culp *vs.* Alonzo W. Allen, appellant. Certiorari to the court of common pleas, No. 4, for the county of Philadelphia. Returnable the first Monday of January, 1895. Rule on the appellee to appear and plead on the return day of the writ. June 12, '94, brought into office. C. B. R. Filed Jan'y 2, 1895, in supreme court. J. W. Shannon, H. T. Fenton.

I certify that Alonzo W. Allen, John W. Hepworth, and John G. Haslan are surety in the within case in the sum of five hundred ($500) dollars.

CHAS. S. GREENE,
Prothonotary.

50 Supreme Court of Pennsylvania, July Term, 1894.

ANDREW J. CULP *vs.* ALONZO W. ALLEN, Appellant. } No. 138. From C. P. 4, Philadelphia, of June T., 1893. No. 220.

Per curiam:

This case depended mainly on questions of fact which were fairly submitted to the jury with instructions which appear to have been substantially correct and adequate. The only subjects of complaint are the affirmance of plaintiff's 2nd and 4th points for charge recited in the first two specifications and the refusal of the court to affirm defendant's fifth and sixth points recited in the two remaining specifications. There is nothing in the record that would justify us in sustaining either of the specifications of error. The points recited therein were each correctly answered. As embodied in his sixth point, the contention of the defendant that "the joint action of the parties in surrendering the patent in question and applying for a reissue thereof amounted to a cancellation of the patent," etc., is untenable. Sec. 4916 of the Revised Code provides that "such surrender shall take effect upon the issue of the amended patent." The alleged surrender, therefore, never became effective, because the reissue which the parties applied for was refused. The case appears to have been carefully and correctly tried, and we think the judgment should be affirmed.

Judgment affirmed.

Filed February 4, 1895, in supreme court.

51 EASTERN DISTRICT OF PENNSYLVANIA, *sct:*

The Commonwealth of Pennsylvania to the justices of the common pleas court, No. 4, for the county of Philadelphia, Greeting:

Whereas, by virtue of our writ of certiorari from our supreme court of Pennsylvania for the eastern district, returnable in the same court on the first Monday of January, in the year of our Lord one thousand eight hundred and ninety-five, a record was brought into the same court upon appeal by Alonzo W. Allen from your judgment made in the matter of No. 220, June term, 1893, wherein Andrew J. Culp was plaintiff and the said appellant was defendant;

And it was so proceeded in our said supreme court that the following decree was made, to wit, judgment affirmed;

And the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas, No. 4, for the county of Philadelphia aforesaid, as well for execution or otherwise as to justice shall appertain, wherefore we here remit you the record of the decree aforesaid and the proceedings thereupon in order for execution or otherwise as aforesaid.

Witness the Honorable James P. Sterrett, doctor of laws, chief justice of our said supreme court, at Philadelphia, the fourth day of February, in the year of our Lord one thousand eight hundred and ninety-five.

LEWIS C. GREENE,
Pro Prothonotary.

52 [Endorsed:] C. P. 4., June T., 1893. No. 220. No. 138. July term, 1894, Supreme court. Andrew J. Culp *vs.* Alonzo W. Allen. Remittitur. Att'y, $3.00; pro., 7.25; rem., .75. Filed Feb'y 4, '95. C. B. R. Geo. B. Carr, pl'ff's att'y.

53 Know all men by these presents that we, Alonzo W. Allen, John W. Hepworth, and John G. Haslan, are held and firmly bound unto Andrew J. Culp in the full and just sum of $800, to be paid to the said Andrew J. Culp, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally.

Sealed with our seals and dated this 12th day of February, in the year of our Lord 1895.

Whereas lately, at a court of common pleas, No. 4, for the county of Philadelphia (No. 220, of June term, 1893), in a suit depending in said court between Andrew J. Culp, plaintiff, and Alonzo W. Allen, defendant, a judgment was rendered against the said defendant on June 12, 1894, and the said defendant having in due season removed the record in said cause by proper proceedings in error to the supreme court of Pennsylvania, in which said last-mentioned court on February 4th, 1895, a judgment was rendered against the said defendant affirming the judgment appealed from, and by its writ of remittitur certified its said judgment, together with the original record, to the said court of common pleas on February 5, 1895, and the said defendant, Alonzo W. Allen, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Andrew J. Culp, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days:

Now, the condition of the above obligation is such that if the said Alonzo W. Allen shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

ALONZO W. ALLEN. [SEAL.]
JOHN W. HEPWORTH. [SEAL.]
JOHN G. HASLAN. [SEAL.]

Sealed and delivered in presence of—
J. W. SHANNON.
T. W. McCANN.

Approved by—
ROBERT N. WILLSON,
Judge of Court of Common Pleas, No. 4, of Philadelphia County.

Approved by—
GEORGE SHIRAS, JR.,
Associate Justice of Supreme Court of United States.

Endorsed: 220. June T., 1893. C. P. 4. Culp *vs.* Allen. Supersedeas bond. (Surwrit of error to Supreme Court of United States. Filed Feb. 14, 1893. C. B. Roberts, *pro* proth'y.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

I, William B. Mann, prothonotary of the courts of common pleas of said county, which are courts of record, having a common seal, being the officer authorized by law to make the following certificate, do hereby certify that Robert N. Willson, whose name is subscribed in approval of the accompanying bond, was at the time of such approval and is now a judge of the court of common pleas, No. 4, for the county of Philadelphia, in commission, and to whose acts full faith and credit are to be given as such, and that I am well acquainted with his handwriting and believe his signature thereto is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 12th day of Feb., 1895.

[SEAL.] (Signed) WILLIAM B. MANN,
Prothonotary.

54 Supreme Court of the United States.

ALONZO W. ALLEN, Plaintiff in Error and Defendant Below, *vs.* ANDREW J. CULP. } Error to Court of Common Pleas, No. 4, for the County of Philadelphia.

And now, February 13th, 1895, before the justices of said court, comes Alonzo W. Allen, plaintiff in error, by Hector T. Fenton, his attorney, and says that by the record aforesaid there is error in the various rulings hereinbefore excepted to, and also in the following particulars:

I. That the trial judge erred in affirming the plaintiff's 2nd point, which was as follows (submitted by plaintiff and affirmed): "Where the reissue of letters patent of the United States is applied for the surrender takes effect only upon the issue of the amended patent, and if the reissue is refused the original patent is returned to its owner."

II. The trial judge erred in affirming the plaintiff's 4th point, which was as follows (submitted by plaintiff and affirmed): "The action of the Patent Office in refusing to reissue the patent in suit did not affect its validity, and the contract between the plaintiff and defendant in reference thereto was not rendered invalid by such action."

III. The trial judge erred in refusing to affirm defendant's 5th point, which was as follows (submitted by defendant and refused:) "If, after the alleged making by the defendant of a promise to account to the plaintiff for past profits on the patented machines previously manufactured by the defendant, the parties joined in a surrender of the patent and an application for a reissue thereof, such act amounts in law to an extinguishment of the patent and to a legal cancellation of any claim based thereon for profits on the patented machines made prior to that date."

IV. The trial judge erred in refusing to affirm defendant's 6th point, which was as follows (submitted by defendant and refused): "The joint act of the parties in surrendering the patent in question and applying for a reissue thereof on November 18, 1892, amounted to a cancellation of the patent, and, being followed by a refusal on the part of the Government to grant the reissue, operated to end and determine the contract sued upon as to any of the patented machines made after such surrender."

V. The court below erred in entering judgment in favor of the plaintiff below.

Wherefore plaintiff in error prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid, as the same more fully appear therein, may be reversed and annulled.

H. T. FENTON,
Attorney for Plaintiff in Error.

55 [Endorsed:] Supreme Court U. S. (C. P. 4, June T., 1893. No. 220.) Culp *vs.* Allen. Assignments of error. (Surwrit of error to Supreme Court of U. S.) Filed Feb. 15, 1895. P. H. White, *pro* proth'y. Fenton.

Endorsed on cover: Case No. 15,855. Pennsylvania, Philadelphia, common pleas No. 4 Term No., 581. Alonzo W. Allen, plaintiff in error, *vs.* Andrew J. Culp. Filed April 4, 1895.